[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN J.S.C. Justice

PART 52

Index Number : 102649/2001
MONGELLUZZO, MARIA
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 006
DISMISS

INDEX NO. 102649/01

MOTION DATE

MOTION SEQ. NO. 06

MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 3/15/11

CYNTHIA S. KERN J.S.C.
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

----------x

MARIA MONGELLUZZO,

Plaintiff,

-against-

THE CITY OF NEW YORK and SAUL EISENBERG, as Successor Trustee of Edward P. Katz 1985 Children's Trust,

Defendants.

----------x

Index No. 102649/2001

DECISION/ORDER

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Notice of Cross Motion and Answering Affidavits.....	2
Affirmations in Opposition to the Cross-Motion.....	3
Replying Affidavits.....	4
Exhibits.....	5

Plaintiff commenced this action to recover damages for personal injuries she allegedly sustained on January 28, 2000 when she slipped and fell on ice while walking on the sidewalk at Third Avenue and 62nd Street in New York City. Defendant the City of New York (the "City") moves for summary judgment dismissing the complaint and any cross-claims against it. Plaintiff cross-moves for an order pursuant to General Municipal Law ("GML") § 50-e declaring it the law of the case that the Notice of Claim filed on April 26, 2000 permits plaintiff to argue at trial that the condition of the sidewalk is one cause of the formation of the piece of ice on which plaintiff slipped and fell, or in the alternative, granting plaintiff leave to file an Amended Notice

of Claim pursuant to GML § 50-e(6) or declaring plaintiff's Amended Notice of Claim properly filed *nunc pro tunc* to November 15, 2000.

The relevant facts are as follows. On January 28, 2000 around 6:30 p.m., plaintiff was walking south on the west side of Third Avenue from around 63rd Street to 62nd Street. At the corner of 62nd Street and Third Avenue, plaintiff stopped to cross the street. According to plaintiff, due to an accumulation of ice on the sidewalk at this corner, she twisted her foot and slipped and fell. The Local Climatological Data from the Central Park Observatory for January 2000 noted 5.5 inches of snow fall on January 25, 2000 and the temperature remained below freezing between January 25, 2000 and January 28, 2000.

On April 25, 2000, plaintiff filed a Notice of Claim against the City. This Notice of Claim stated a "slip and fall on a city sidewalk" as the nature of the claim and described the manner in which the claim arose as slipping on "a piece of ice negligently allowed to remain on said sidewalk" causing injury. On November 15, 2000 – seven months after the statutorily prescribed period for filing a Notice of Claim against the City had expired – plaintiff filed a second Amended Notice of Claim against the City without leave of court. This Amended Notice of Claim amended the language describing the manner in which the claim arose as slipping and falling on "ice negligently allowed to remain on said sidewalk and which was formed when water pooled in a crack in the sidewalk of which the City had prior written notice." On April 23, 2001, the City filed a motion for summary judgment and/or motion to dismiss the complaint. On August 16, 2001, Justice Friedman denied the City's motion without prejudice to file a new motion for summary judgment after the completion of discovery. Justice Friedman – without referencing the Amended Notice of Claim – noted in her decision that "plaintiff raised a triable issue of fact as to whether defendant City had notice of a defective condition in the sidewalk

which caused ice on which plaintiff fell to collect." A trial date was set for December 4, 2006. On December 4, 2006, plaintiff's counsel notified J.H.O. Ira Gammerman that plaintiff required an adjournment because she needed to have surgery. J.H.O. Gammerman denied plaintiff's request and dismissed plaintiff's case for failure to prosecute. Plaintiff moved to vacate the order dismissing the action and to restore it to the trial calendar. This court granted plaintiff's motion and restored the case to the trial calendar. This court also granted the City an opportunity to make a motion for summary judgment prior to the action being restored to the trial calendar. This motion for summary judgment is what is being addressed in the instant decision.

The court denies plaintiff's request for leave to file an Amended Notice of Claim under GML § 50-e(6). "General Municipal Law § 50-e(6) notice of claim amendment provision merely permits correction of good faith, non-prejudicial, technical mistakes, defects or omissions, not substantive changes in the theory of liability." *See Mahase v Manhattan & Bronx Surface Tr. Operating Auth.*, 3 A.D.3d 410 (1st Dept 2004). "Any amendment that creates a new theory of liability is not within [GML § 50-e(6)]'s purview." *See White v New York City Hous. Auth.*, 288 A.D.2d 150 (1st Dept 2001). Plaintiff's proposal to amend the Notice of Claim to include language referencing a crack in the sidewalk of which the City allegedly had prior notice does not merely constitute the correction of a technical mistake or omission. Rather, it is a substantive change in the theory of liability as a personal injury claim for an injury caused by snow and ice on the sidewalk requires different elements of proof than an action arising from an injury caused by a defective sidewalk. As such, plaintiff cannot avail herself to GML § 50-e(6) as that provision only applies to technical defects or omissions, not substantive changes in the theory of liability.

Since what plaintiff is seeking is a substantive change in the theory of liability, plaintiff would have to amend her Notice of Claim under GML § 50-e(5). However, it is too late for plaintiff to amend her Notice of Claim. GML § 50-e(5) specifically prohibits the amendment of the Notice of Claim after the expiration of the statute of limitations for the underlying claim. As the statute of limitations for plaintiff's underlying injury has expired, plaintiff cannot amend her Notice of Claim in the instant action.

The court also denies plaintiff's request to deem her Amended Notice of Claim dated November 6, 2000 properly filed *nunc pro tunc* to November 15, 2000 as an amended notice of claim served upon the City without leave of court is a nullity. *See Juarbe v City of New York*, 303 A.D.2d 462, 463 (2d Dept 2003) ("the proposed amended notice of claim was a 'nullity' as it was served upon the defendant City of New York without leave of the court."). Since plaintiff's Amended Notice of Claim dated November 6, 2000 which was served without leave of court is a nullity, this court denies plaintiff's request to deem her Amended Notice of Claim properly filed *nunc pro tunc*.

The court also declines to declare it the law of the case that the Notice of Claim filed on April 26, 2000 permits plaintiff to argue at trial that the defective condition of the sidewalk is one cause of the formation of the piece of ice on which plaintiff slipped and fell. Allowing plaintiff to argue at trial that the defective condition of the sidewalk is one cause of the formation of the piece of ice on which plaintiff slipped and fell would in effect allow plaintiff to circumvent the notice requirement under GML § 50-e and argue that it was the defective condition of the sidewalk that caused her injury which is a theory of liability she did not assert in her notice of claim. As discussed more fully above, a claim for an injury caused by a defective sidewalk requires different elements of proof than a claim for an injury caused by an icy condition on the

sidewalk. Accordingly, the court declines to declare it the law of the case that the Notice of Claim filed April 26, 2000 permits plaintiff to argue at trial that the defective condition of the sidewalk is one cause of the formation of the piece of ice on which plaintiff slipped and fell.

Finally, this court recognizes that Justice Friedman, in her decision addressing the City's first motion for summary judgment, decided that there was a triable issue of fact as to whether the City had notice of a defective condition in the sidewalk which caused ice on which plaintiff fell to collect. However, plaintiff did not seek and Justice Friedman did not otherwise grant leave for plaintiff to file an Amended Notice of Claim. Accordingly, although Justice Friedman references a defective condition in the sidewalk and assumes it as a part of the plaintiff's theory of liability in her decision, this court will not follow that determination because there was no mention of a defective condition in the sidewalk in plaintiff's first and only valid notice of claim.

The court will now turn to the City's motion for summary judgment. The court denies the City's motion for summary judgment for the reasons set forth below. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v Prospect Hosp.,* 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v City of New York,* 49 N.Y.2d 557, 562 (1980). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

In order to find a municipality liable in a personal injury case where the plaintiff injured herself while walking on snow or ice, "the interference with travel must be, (1) Dangerous (2) Unusual or exceptional; that is to say, different in character from conditions ordinarily and

generally brought about by the winter weather prevalent in the given locality." *See Saez v City of New York*, 82 A.D.2d 782 (1st Dept 1981). In addition, the City must have had notice of the dangerous condition and a reasonable opportunity to correct it or warn of its existence. *See Candelier v City of New York*, 129 A.D.2d 145, 148 (1st Dept 1987).

In the instant case, the City's motion for summary judgment is denied as there are material issues of fact as to whether the icy condition on which plaintiff fell was dangerous and unusual. The City argues that the existence of a piece of ice on the sidewalk in the middle of winter a few days after snowfall in below-freezing temperature was not dangerous, unusual, or exceptional for New York City. However, plaintiff testified that there was a "significant amount of ice" and that the ice patch was "bumpy." The court finds that it is an issue of fact for the jury to determine whether a sidewalk that is "bumpy" with a "significant amount of ice" is dangerous or unusual despite it being below-freezing temperatures a few days after a snowstorm in New York City.

In addition, the court also finds that there are material issues of fact as to whether the City had notice of the icy condition on the sidewalk as the City has not met its burden of producing evidence in admissible form demonstrating that it did not have notice of the icy condition. The City argues that plaintiff has not produced evidence affirmatively demonstrating that the City had notice of the icy condition. However, it is not plaintiff's burden to affirmatively demonstrate actual or constructive knowledge on the party of the City. It is the City's burden, as the movant, to demonstrate an absence of a material issue of fact as to whether it had notice of the icy condition. Since the City has failed to meet its initial burden, the burden does not shift to plaintiff.

Finally, the court also finds that there are also material issues of fact as to whether the City had a reasonable period of time to clear the snow and ice from the sidewalk. The City argues that the cold temperatures coupled with 5.5 inches of snow demonstrates that it did not have a reasonable period of time to clear the snow and ice from the sidewalk. However, "[t]here is no formula for determining liability on the basis of any ration between the number of inches and the time elapsed before the happening of the accident and, ordinarily ... these factors, as well as all the other conditions, constitute a jury question." *See Candelier v City of New York*, 129 A.D.2d 145, 150 (1st Dept 1987). Here, the City has failed to demonstrate evidence of any extraordinary factors that would take this issue away from the jury. Accordingly, the court finds that the City has failed to meet its burden of demonstrating an absence of material issues of fact that it did not have a reasonable period of time to clear the snow and ice from the sidewalk location where plaintiff fell.

Accordingly, the court denies the City's motion for summary judgment in its entirety and denies plaintiff's cross-motion seeking to amend her Notice of Claim, denies plaintiff's cross-motion seeking to deem her Amended Notice of Claim dated November 6, 2000 properly filed *nunc pro tunc* and denies plaintiff's request to deem it the law of the case that the Notice of Claim filed on April 26, 2000 permits plaintiff to argue at trial that the defective condition of the sidewalk is one cause of the formation of the piece of ice on which plaintiff slipped and fell This constitutes the decision and order of the court.

Dated: 3/5/11

FILED

MAR 16 2011

NEW YORK
COUNTY CLERK'S OFFICE

Enter: _____

J.S.C.

CYNTHIA S. KERN
J.S.C.